

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JILL CHARMAINE BOURGEOIS,)	
)	
Plaintiff,)	Case No. C10-5469-RSM-BAT
)	
v.)	REPORT AND
)	RECOMMENDATION
MICHAEL J. ASTRUE, Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	

Jill C. Bourgeois, seeks review of the denial of her Supplemental Security Income and Disability Insurance Benefits applications. She contends the ALJ erred by (1) rejecting the opinions of treating doctor Susan Shlifer, M.D. and (2) by rejecting the opinions of examining doctors Mark Redmon, Psy.D, Paul Choi, M.D. and Kimberly Wheeler, Ph.D. Dkt. 14. As discussed below the Court recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Ms. Bourgeois is currently 49 years old, has 14 years of education, and has worked as a cashier and a resident nursing assistant.¹ On August 8, 2006, she applied for benefits alleging disability as of July 10, 2004. Tr. 80. Her application was denied initially and on

¹ Tr. 80, 102, 530.

1 reconsideration.² The ALJ conducted a hearing on August 26, 2008, and issued a decision on
 2 November 12, 2008 finding Ms. Bourgeois not disabled. Tr. 14. As the Appeals Council denied
 3 Ms. Bourgeois' request for review, the ALJ's decision is the commissioner's final decision. Tr.
 4 4-7.

5 II. THE ALJ'S DECISION

6 Utilizing the five-step disability evaluation process,³ the ALJ made the following
 7 findings:

8 **Step-one:** Ms. Bourgeois has not worked since July 10, 2004. Tr. 19.

9 **Step-two:** Ms. Bourgeois has the following severe impairments: depression, anxiety
 10 disorder NOS, and substance abuse. Tr. 20.

11 **Step-three:** These impairments do not meet or equal the requirements of a listed
 12 impairment.⁴

13 **Residual Functional Capacity:** Ms. Bourgeois can perform a full range of work at all
 14 exertional levels but with the following nonexertional limitations: she can have limited to
 15 infrequent contact (20% or less) with the public. Tr. 23.

16 **Step-four:** Ms. Bourgeois can perform her past work as a housekeeper. Tr. 30.

17 **Step-five:** Assuming Ms. Bourgeois cannot perform her past work, there are jobs Ms.
 18 Bourgeois can perform. She is therefore not disabled. Tr. 31.

19 III. DISCUSSION

20 A. The ALJ's Step Two Analysis

21 Dr. Shlifer diagnosed Ms. Bourgeois with fibromyalgia and chronic fatigue syndrome
 22 (CFS) and opined that based on these conditions, Ms. Bourgeois cannot work.⁵ At step-two, the
 23 ALJ rejected the doctor's fibromyalgia diagnosis indicating there are no "tender point

² Tr. 71-72, 75-77.

³ 20 C.F.R. §§.1520, 416.920.

⁴ 20 C.F.R. Part 404, Subpart P. Appendix 1.

⁵ See Tr 395-96.

1 assessments” and rejected the doctor’s CFS diagnosis because the doctor did not note symptoms
2 that met the accepted criteria for CFS. Tr. 20-21. By rejecting these diagnoses, the ALJ also
3 rejected the doctor’s opinion that Ms. Bourgeois cannot work. TR. 21.

4 Ms. Bourgeois argues the medical evidence regarding the doctor’s opinions is ambiguous
5 and the ALJ erred in rejecting Dr. Shlifer’s opinion without developing the record further. The
6 Court agrees. The ALJ has a duty to develop the record to resolve ambiguity. “Ambiguous
7 evidence, or the ALJ’s own finding that the record is inadequate to allow for proper evaluation of
8 the evidence, triggers the ALJ’s duty to ‘conduct an appropriate inquiry.’” *Tonapetyan v. Halter*,
9 242 F.3d 1144, 1150 (9th Cir. 2001) (citation omitted).

10 In *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996), the ALJ rejected a treating doctor’s
11 opinion because it was “unsubstantiated” and there were no comments supporting the doctor’s
12 statement. *Id.* at 1287-88. The Ninth Circuit stated “[i]f the ALJ thought he needed to know the
13 basis of Dr. Hoeflich’s opinions in order to evaluate them, he had a duty to conduct an
14 appropriate inquiry.” *Id.* In this case, the ALJ rejected Dr. Shlifer’s diagnoses indicating her
15 treatment records did not contain specific findings or criteria the ALJ deemed necessary. No
16 other doctor gave an opinion that contradicted Dr. Shlifer’s diagnoses. Thus, the ALJ’s
17 assessment of the doctor’s opinion hinged largely on the basis of the doctor’s opinions. Under
18 these circumstances, the ALJ had a duty to conduct an inquiry into the basis of the doctor’s
19 opinions.

20 The ALJ’s duty to inquire in this particular case is highlighted by the ALJ’s finding Ms.
21 Bourgeois was dishonest with the doctor about her drug use and that “*if* Dr. Shlifer had known
22 that the claimant had not completed substance abuse treatment and that she continued to use
23 marijuana, Dr. Shlifer *might* not have been so ready to accept the claimant’s pain complaints.”

1 *Id.* (emphasis added). Rather than guess at what Dr. Shlifer's opinion might have been, an
2 appropriate inquiry should be made. Accordingly, the ALJ erred in rejecting Dr. Shlifer's
3 opinions.

4 **B. Assessment of Other Medical Evidence**

5 **1. Dr. Paul Choi, M.D.**

6 Ms. Bourgeois argues, and the Court agrees, the ALJ erred in assessing Dr. Choi's
7 opinions. In his psychiatric evaluation, Dr. Choi opined Ms. Bourgeois' "interactions with
8 coworkers and the public may be somewhat inhibited and negatively affected by her anxiety and
9 occasional feeling of panic and terror" and that "it is unclear whether or not she would be able to
10 perform work activities on a consistent basis because of this fear." Tr. 189-90. The ALJ rejected
11 this opinion for four reasons. First, that it was based on Ms. Bourgeois' subjective reports which
12 the ALJ found not credible. An ALJ does not provide adequate reasons for rejecting an
13 examining physician's opinion by questioning the credibility of the patient's complaints where
14 the doctor does not discredit those complaints and supports his ultimate opinion with his own
15 observations. *Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001). Dr. Choi did not
16 discredit Ms. Bourgeois in any way and thus this is not a proper ground to reject the opinion.

17 Second, that Ms. Bourgeois does not suffer from panic attacks because she can ride the
18 bus, attend medical appointments and counseling sessions, and has no medically documented
19 history of panic attacks. Tr. 26. This is not an adequate reason because Dr. Choi did not
20 diagnose Ms. Bourgeois as suffering from panic attacks. Tr 189. Rather, he diagnosed her with
21 anxiety disorder and that her feelings of panic are a symptom of the disorder. Hence the lack of
22 medical history diagnosing panic attacks is not grounds to reject the doctor's opinion. As to Ms.
23 Bourgeois' ability to ride the bus, that may show she can be around others. However, it does not

1 show she can work with others or handle the stress of a workplace. And finally, that Ms.
2 Bourgeois sees her doctors and counselors does not show she does not suffer feelings of panic or
3 anxiety. It indicates she has mental health problems for which she receives treatment. But going
4 to the doctor does not show she can work with others or handle the stresses of a normal
5 workplace. The ALJ may not penalize a claimant for attempting to live a normal life in the face
6 of her limitations. *See Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir. 1987). Hence Ms.
7 Bourgeois' attendance at doctors appointments or taking the bus are not grounds to reject the
8 doctor's opinions.

9 Third, Ms. Bourgeois has not been compliant with her medications and did not seek
10 mental health counseling until 2008. Tr. 28. Unexplained failure to seek treatment is a clear and
11 convincing reason to question a claimant's credibility. *See Fair v. Bowen*, 885 F.2d 597, 603
12 (9th Cir. 1989). However, where a claimant failed to seek treatment because she lacked medical
13 insurance, that would not support an adverse credibility determination. *Orn v. Astrue*, 495 F.3d
14 625, 638 (9th Cir. 2007). The ALJ's finding Ms. Bourgeois was not taking her medications is
15 based on her admission that she was not taking her trazadone and Xanax. Tr. 25. Ms. Bourgeois
16 made that admission to Dr. Choi who also noted "she is not taking these medications at this time
17 because she cannot afford to pay for medications." Tr. 186.

18 The record shows Ms. Bourgeois began mental health treatment with Kitsap Mental
19 Health Services in 2008. Here, Dr. Choi noted that Ms. Bourgeois' prognosis was poor due to
20 the chronicity of her illness and "the difficulties that she has had accessing medical and mental
21 healthcare." Tr. 189. This indicates there may be a legitimate reason, such as lack of medical
22 insurance, explaining why Ms. Bourgeois did not begin mental health treatment until 2008.
23 Hence, without more information, the fact Ms. Bourgeois started mental health treatment in 2008

1 is not a basis to discount the doctor's opinion.

2 And fourth, that Ms. Bourgeois abused alcohol and was assaulted numerous times in the
3 past, but now that she is sober she interacts with examiners and family members. Tr. 28. There
4 is no evidence that Ms. Bourgeois is not mentally ill and that her problems flow from abusing
5 alcohol. Indeed, the ALJ found that Ms. Bourgeois' depression and anxiety disorder were
6 serious impairments. Hence past alcohol use is not a grounds to discount the doctor's opinions
7 about her mental impairments. Additionally, Ms. Bourgeois' ability to interact with examiners
8 and family members might show she is not oppositionally defiant but does not show that she can
9 work with others. Additionally, as noted above, an ALJ may not penalize a claimant for
10 attempting to live a normal life in the face of her limitations.

11 **2. Dr. Kimberly Wheeler, Ph.D.**

12 Dr. Wheeler opined Ms. Bourgeois is severely limited in her ability to relate to others in
13 the workplace, and has marked or significant limitations in the ability to interact with the public
14 or tolerate the pressures of the workplace and maintain appropriate behavior. Tr. 265. The ALJ
15 rejected Dr. Wheeler's opinions for the same reasons she rejected Dr. Choi's opinions. Tr. 28.
16 As discussed above, those reasons are inadequate.

17 **3. Dr. Mark Redmon, Psy.D.**

18 The ALJ rejected Dr. Redmon's diagnosis of somatization disorder finding the medical
19 evidence does not support the diagnosis. Tr. 29. However, to simply say a medical opinion is
20 not supported by the medical evidence is a conclusory statement and not an adequate reason to
21 reject the opinion. *See Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988). The ALJ also
22 rejected Dr. Redmon's diagnosis of somatization disorder indicating none of the other examining
23 doctors diagnosed Ms. Bourgeois with somatization or pain disorder. Tr. 22. While the other

1 examining doctors did not make these diagnoses, they did not render opinions excluding or
2 contradicting Dr. Redmon's opinion. Additionally, Dr. Shilfer diagnosed Ms. Bourgeois with
3 fibromyalgia and made numerous references in her records to Ms. Bourgeois' pain symptoms
4 which is far more consistent with Dr. Redmon's opinion, than inconsistent.

5 The ALJ also rejected Dr. Redmon's opinions that Ms. Bourgeois' work capacity is
6 limited, that her mental problems hinder her ability to work, and that she would "struggle with
7 absenteeism, distractability, poor task completion, and conflicts with supervisors and
8 coworkers." Tr. 335. As grounds, the ALJ, indicated the doctor's opinions were based on Ms.
9 Bourgeois' "uncorroborated" subjective pain complaints. Tr. 29. This is not an adequate basis
10 to reject the opinions. First, it is based the ALJ's erroneous rejection of Dr. Shilfer's
11 fibromyalgia diagnosis and findings that Ms. Bourgeois suffers from chronic pain. Second, the
12 lack of objective medical evidence cannot be the sole reason an ALJ discounts subjective
13 complaints. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005); *see also Lester v. Chater*, 81
14 F.3d 821, 834 (9th Cir. 1996) (Claimant's testimony of disabling pain cannot be discredited
15 "merely because [it is] unsupported by objective evidence.")

16 The ALJ also rejected most of Dr. Redmon's opinions on the grounds the tests he
17 performed were "subjective instruments" or inconsistent with Ms. Bourgeois' cognitive
18 functioning. Tr. 29. Dr. Redmon performed a battery of psychological tests to detect evidence
19 of malingering, estimate Ms. Bourgeois' cognitive abilities, screen for brain damage, and assess
20 "self-concept, emotional and interpersonal functioning." Tr. 332. There is no evidence these
21 tests are improper, inaccurate or not accepted by medical professionals, and are not genuine
22 diagnostic tools mental health professionals rely upon in reaching an opinion.

23 The ALJ did accept Dr. Redmon's test results finding Ms. Bourgeois' has "average"

1 cognitive abilities. But Dr. Redmon did not opine that Ms. Bourgeois cannot work because she
2 lacks cognitive abilities. Rather he opined she cannot work due to depression, difficulty
3 concentrating, anxiety and somatization disorder.

4 The ALJ also indicated Ms. Bourgeois is dishonest with the doctors who have seen her
5 about her drug use in an attempt to manipulate them for secondary gain. Tr. 29. But Dr.
6 Redmon's evaluation indicates he was quite aware of Ms. Bourgeois' substance abuse problems
7 and her recently use of illegal drugs despite treatment. Tr. 335-36. Having that knowledge, he
8 nonetheless concluded Ms. Bourgeois genuinely suffers from mental illness that severely impairs
9 her ability to work.

10 IV. CONCLUSION

11 For the foregoing reasons, the Court concludes the ALJ erred in assessing the medical
12 evidence at step two and four. The Court recommends that the Commissioner's decision be
13 **REVERSED** and this case is **REMANDED** for further administrative proceedings. On remand,
14 the ALJ should: (1) further develop the medical evidence, as necessary; (2) reevaluate the
15 medical opinions in the record, (3) reassess step two of the evaluation process; (4) reevaluate Ms.
16 Bourgeois' RFC; and (5) reassess steps four and five of the sequential evaluation process with
17 the assistance of a vocational expert if deemed appropriate. A proposed order accompanies this
18 Report and Recommendation.

19 DATED this 10th day of February, 2011.



20
21 BRIAN A. TSUCHIDA
22 United States Magistrate Judge
23